United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 22,094

543

DONVIL L. McMORRIS,

Appellant

v

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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TABLE OF CONTENTS

Table of Cases

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. The issue concerns the correctness of a ruling by the Trial Court in admitting in-court identification by two assault victims, wherein it developed that appellant was singley confronted by the victims at a place away from the scene of the incident, later viewed at the preliminary hearing and whether the Government proved that the in-court identification had an independant origin other than at the confrontation where appellant was viewed alone and not in a lineup.

2. The issue concerns the correctness of an alibi instruction to the jury where the jury was told that they must ask themselves whether the alibi was established and if it was established then the Government must beyond a reasonable doubt negate it and whether such an instruction was plainly erroneous as it militated against the burden of proof and presumption of innocence.

This is the first instance in which this case has been on appeal to this Court.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DONVIL L. McMORRIS,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

No. 22,094

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

STATEMENT OF THE CASE

This is an appeal from a criminal conviction in the United States District Court for the District of Columbia on four (4) Counts of a Nine Count Indictment. Appellant was tried on Counts Five (5) through Nine (9), the first Counts being severed. The Court granted a judgment of acquittal on the Count charging Assault with Intent to Kill and Appellant was convicted of Two Counts of Assault with Intent to Rob and Two Counts of Assault with a Dangerous Weapon. From the judgment of conviction, timely notice of appeal was filed.

The evidence from the standpoint of the Government was essentially as follows:

The first witness, Martin J. Haker, Jr., testified that on the morning of Thursday, July 13, 1967, he was in the company of a Miss Suzanne Clark in Haker's automobile at 14th and Quincy Streets, N.E., Washington, D.C. (Tr. 13-14, 18). Miss Clark screamed and Haker, seated in the middle of the front seat of the car, turned to the window and saw a man pointing a gun. (Tr. 15.). The man was halfway through the driver's window. (Tr. 19). Haker grabbed the gun with his left hand and the gun discharged. He put his right hand around the man's neck, at which time the man pulled through the window and Haker fell to the ground. (Tr. 15-16; 19). The man then hit Haker over the head with the gun and they struggled to the back of the car at which time the gun discharged again. (Tr. 17, 20). Haker struck the man in the forehead and started to run down the street with the man in pursuit. (Tr. 20). The man stopped and started back toward the car. Haker ran to the top of a hill where he joined Miss Clark. (Tr. 21).

The man then was back at the car and jumped through the window. Haker told the man to get away from the car at which time the man walked some 15 yards from the car and 25 yards from Haker, turned around and fired two shots at Haker. (Tr. 22-23). Haker screamed and fell, feigning being hit by the bullets. The man ran, after which Haker and Miss Clark got into the car and drove until he found a police officer. (Tr. 25-26). He talked to a police officer giving a description of the assailant, being approximately 5' 11" or 6' wearing a light blue shirt and dark pants. (Tr. 26). Haker was

then taken to Providence Hospital for treatment. (Tr. 26).

The Court, anticipating a confrontation between appellant and the complainants at the hotel, interrupted the proceedings and a long colloquy ensued concerning the recent "line-up" decisions of the Supreme Court (the Wade-Gilbert-Stovall trillogy). (Tr. 26-50). At the conclusion, an identification hearing was ordered by the Court, out of the presence of the jury.

The first witness at the hearing was Lt. Earl Drescher of the Metropolitan Police Department.

About 1:00 A.M. on the morning of July 13, 1967, he responded to 12th & Quincy Streets and was briefed by Officer Lamb about the incident. (Tr. 55). A lookout was broadcast for a negro male, 18 years old, about 5' 11" 170 pounds, wearing a light blue shirt with shirtail out and dark trousers. (Tr. 56).

Sometime later at 13th & Qunicy Street, the officer observed a subject who matched the description of the lookout. (Tr. 57-58). This was shortly after 2:00 A.M. He had a conversation with the man telling him that a serious crime had been committed and he did not have to answer questions. (Tr. 59). Drescher stated that the man volunteered to answer them and stated that he would be glad to go to the hospital. (Tr. 59

The man was taken to the hospital in a cruiser with Detective Thomas and a Private Murphy, with Drescher following behind. When Drescher arrived at the hospital he stated that he was advised by Officer Lamb that the subject had been identi fied. (Tr. 60). Drescher talked to Mr. Haker and Miss Clark

and both assured him that there was no doubt in their minds about the subject being the man in question. (Tr. 61). The subject was identified by Drescher as the appellant. (Tr. 61). He further stated that the extent of the advice given to appellant at 13th & Quincy was that a serious crime had been committed, he would like to talk to him about it and that if he did not care to answer his questions he would not have to. (Tr. 61). He further stated that at the time he confronted appellant on the street and talked to him and he was taken to the hospital, appellant was not arrested. (Tr. 62).

On cross-examination, Drescher stated that from what he had heard from the lookout, appellant was a prime suspect. (Tr. 65). Further, Drescher was asked:

> "Q. Did you feel from the description, lookout, and the fact that you were standing beside him talking with him, did you feel at that time you had enough to carry him as a prime suspect two three blocks to Providence Hospital for a hospital identification.
>
> "A. I believe I would have had enough if I went that route, sir." (Tr. 65).

Further on, Drescher was asked, whether he told appellant he had a right to an attorney and he replied he did not. (Tr. 66). He never told appellant that he had the right to an attorney at a confrontation. (Tr. 67).

The next witness was Private Charles J. Murphy of the 12th Precinct. He met Lieutenant Drescher and the appellant at 13th and Quincy and drove appellant to Providence Hospital with Detective Thomas. As they got out the car, Mr. Haker and Miss Clark were coming out of the hospital and they were asked

whether they could identify the appellant. (Tr. 71).

Haker shook his head yes. (Tr. 72). Detective Thomas then asked Miss Clark whether she could identify the appellant and she said yes. (Tr. 72-73).

Murphy put appellant's physical description as about 5' 11" about 170 pounds, wearing a light blue shirt, dark pants and having a small nick on the bridge of his nose. (Tr. 73).

Appellant was placed under arrest and taken to the 12th precinct, where Murphy stated that he was pretty sure the complainants saw appellant at the station because statements were gotten from them. He did not remember whether they were asked to further identify appellant. (Tr. 74).

On cross-examination, Murphy stated that upon arriving at the hospital, the suspect got out of the car, stepped up on the sidewalk and faced the two complainants. (Tr. 79). Appellant was not advised that he had the right to counsel at the confrontation. (Tr. 80-81).

The next witness at the hearing was Martin Haker. He stated that there was a light post approximately 10 or 15 feet from where he was parked on the parking lot at 12th & Quincy Street. That when he turned around after hearing Miss Clark scream, he was about a foot from the appellant's face. (Tr. 83). Also that approximately a second elapsed until the gun went off. (Tr. 84). It was a matter of seconds from the time he was pulled through the window and rolled over outside the car. (Tr. 84). The appellant was over him and he stated that he could see his face clearly. The two of them were at the back of the car for about 10 or 15 seconds a foot apart. (Tr.

After Haker ran he stated that he ran about 200 yards with appellant about 10 to 15 yards behind during a time interval of some 15 to 20 seconds. (Tr. 86-87). After the chase appellant stopped and was about 20 or 25 yards from Haker and then Haker went up the hill and appellant went back to the car. (Tr. 87). He went in the car window and at the time was approximately 15 yards from complainant. (Tr. 88). After he left the car he walked away about 10 or 15 yards, turned around and shot twice. (Tr. 88-89). Haker stated that appellant was a couple of yards behind a lamp post and that after he fired the shots, he ran. (Tr. 89). The whole incident took about four or five minutes. (Tr. 90).

Haker stated that he later saw appellant at Providence Hospital outside the emergency room. (Tr. 90). An officer came to Haker and stated that he had a suspect outside and he wanted Haker to go outside to look at the man, but not say a word. He stated that he saw appellant, wearing a light blue shirt, dark pants, was about 5'11" or 6'. (Tr. 91). He looked at him for about three or four seconds. He further stated that Miss Clark was not with him when he saw appellant. Appellant was standing between two police officers. (Tr. 92). He was not sure whether or not Miss Clark saw appellant before or after he did, but it was not at the same time Haker saw him. (Tr.93).

Haker further stated in response to questions that, excluding the hospital confrontation, he was able to identify appellant as the man who attacked him. (Tr. 93). (This testimony occurred on December 22, 1967, a little over six months from the offense.)

On cross-examination, Haker stated that it was not a fact that he and Miss Clark were coming out of the hospital together and that two police officers were taking appellant out of the scout car. (Tr. 94). He further denied having gone to the 12th Precinct to give a statement. (Tr. 95).

The next witness at the hearing was Susan Clark who stated that she and Haker were in the parking lot of the Franciscan Monastery when she looked up and saw a man in the window pointing a gun. She was startled at first, after a couple of seconds, she screamed. (Tr. 109). Haker turned around and grabbed the gun, it went off, and he was pulled out of the window and they started fighting outside the car. It was about five feet from where she was seated. (Tr. 110). She described the man as wearing a light blue shirt, dark trousers, about 5'11" and weighed 165-170 pounds. (Tr. 112).

Later at Providence Hospital, she was asked to identify the appellant. A policeman asked her to come outside and see if she could recognize him. (Tr. 113). She stated that she went outside alone and saw the man wearing blue shirt, dark trousers, 5'11" and 170 pounds. (Tr. 114). She did not notice whether appellant had any marks or bruises. (Tr. 115). She stated, that excluding what happened at the hospital, she could still tell the appellant as the man who committed the offense. (Tr. 116).

On cross-examination, Miss Clark stated that she agreed with the description given by Haker. (Tr. 118). When she went outside the hospital she saw the man standing against the car and there were several police officers. (Tr. 119).

She said she saw the appellant twice on the night of the offense and again the next day in Court. Also she had seen him again five times in the Courthouse prior to the trial and at the preliminary hearing at which she testified. (Tr. 122-123).

The next witness at the hearing was Officer Billy G. Thomas, a plainclothesman. He met Lt. Drescher at 13th & Quincy Street, about 2:00 p.m. with a subject. The man was transported to Providence Hospital for the complainants to see him. (Tr. 124-125) Thomas went in to the emergency room for the two complainants and they came to the front door just outside of the front door of the emergency room. (Tr. 125). Haker looked at the man and when he went back to the emergency room, stated that the man, was the subject who assaulted him. (Tr. 127). Thomas also stated that Miss Clark came outside to look at the man about the same time Haker did. (Tr. 127).

The next witness was Officer Roy G. Lamb of the 12th Precinct. He stated that he met the complainant, Haker coming south on 12th Street, with no lights on. The car pulled over and Haker got out. He was bleeding badly about the head and face. Haker gave a description of the attacker as being negro male, about 18 years old, 170 pounds, medius dark skin, wearing a light blue shirt, dark pants, the shirt worn on the outside. (Tr. 135). A lookout was broadcast. Haker was taken to Providence Hospital and later that evening Thomas and Murphy brought someone to the hospital. (Tr. 137). Later both complainants came outside. (Tr. 139). Thomas and the two complainants were standing under an arch near the emergency room of the hospital and appellant had gotten out of the car. Appellant got back

into the car and the complainants went back into the hospital. Lamb was in back of complainant's car at the time and did not hear any conversation. (Tr. 140).

Lt. Drescher was recalled by defense counsel concerning appellant's address and its relation to the scene where Drescher first talked to him.

At the conclusion of the hearing, the Court ruled that any testimony concerning the identification at the hospital would be excluded. (Tr. 147). However, the Court ruled that the identification had an independant origin as far as opportunity to observe at the time of the incident. Therefore, the case was permitted to go forward. (Tr. 147-148).

The witness, Martin Hacker, was recalled in the presence of the jury and over objection by defense counsel that his identification testimony was tained, he resumed his examination. (Tr. 151). He testimony concerned the incident at the parking lot and the ensuing struggle with the assailant. He made an in-court identification of appellant. (Tr. 158). In addition, it develpped that Haker testified at a preliminary hearing that date of the incident, July 13, 1967. (Tr.168).

During the cross-examination of Miss Clark, it developed that she had seen appellant in the Courthouse some five times just prior to the trial as well as at the Court of General Sessions. (Tr. 187). Further, that when a description of the man was given by the complainant, Haker, Miss Clark stated that Haker spoke for her. (Tr. 188). She let Haker answer concerning a description and she gave no answers. (Tr. 193). She reiterated during re-direct examination that she had seen

appellant a number of times at the Courthouse the week of the trial and also at the Court of General Sessions the next morning. (Tr. 194).

On re-cross examination, Miss Clark testified that since the Monday preceding the trial she had discussed the description of the attacker with Haker and also that she might have said she was sure of his identity with the police officers. (Tr.195). She further testified that at the Court of General Sessions she was asked by police officers if she could identify appellant. (Tr. 196). Further, as Haker was describing the man she went along with his description. (Tr. 197).

When Private Roy G. Lamb testified, he stated that when he first met Martin Haker the morning of July 13, 1967, that Haker was badly bleeding about the head and face. (Tr. 199).

From the testimony of Charles L. Murphy, Private of the Metropolitan Police Department, it develped that no gun was found and no test were made to determine if appellant had recently fired a gun. (Tr.227-228).

The last witness for the Government, Private Robert B. Hughes of the Metropolitan Police Department testified that when he first met Martin Haker the morning of the incident, he was bleeding profusely from the head or face. (Tr.235).

The defense was alibi. Appellant testified that he met two friends, Henry Galbreath and Tomas Fulton at about 6:00 in the evening of July 12, 1968. The three went to a movie about 9:15 and stayed until the picture ended about 12:15. (Tr. 245). They then went to a sandwich shop about 12:30 and left there for a night club about 12:50. (Tr.247).

The three left the nightclub, located at 9th and U Streets, N.W. about 1:20 after which appellant dropped off his friends at First Street and Rhode Island Avenue, N.W. He then proceeded out Rhode Island Avenue to twelth street and midway in the block on Quincy Street between 13th and 14th Streets, his engine cut off. (Tr. 249). He let the car drift back and parked. After which time he went home to get a screwdriver to fix the car which was about 1:55. (Tr. 250). On the way back to the car he was stopped by Lieutenant Drescher. (Tr. 251.). Both Galbreath and Fulton were called as witnesses for the defense to establish the alibi, namely that appellant was in their company at 1:00 A.M. on July 13, 1967.

During the course of the Court's instructions, the Court told the jury the following as to the alibi defense.

> "Now, ladies and gentlement, the defense in this case, as the Court has indicated to you, is two-fold. There is the defense of alibi, which simply means, 'I wasn't there. I was someplace else.' That is a perfectly legitimate defense. Of course, you must ask yourselves whether it is established. If it is established, then the Government must, beyond a reasonable doubt, negate it in order to make its case.
>
> "The Court gives you this instruction with reference to alibi.
>
> "Evidence has been introduced that the defendant was not present at the time when and the place where this offense was allegedly committed. The claim of alibi is a legitimate, legal and proper claim.
>
> "A defendant may not be convicted of the offense of which he is charged unless the Government proves beyond a reasonable doubt that the defendant was present at the time when and the place where

the offense was committed.

"If, after a full and fair consideration of all of the facts and circumstances in evidence, you find the Government has failed to prove beyond a reasonable doubt that the defendant was present at the time when and the place where the offense charged was allegedly committed, you must find the defendant not guilty." (Tr. 334-335).

No objection was made to the above instruction. At the conclusion of deliberations, the appellant was found guilty of the offenses which were submitted to them.

ARGUMENT

The Identification Issue

Following a report from complainants, Haker and Clark, and a description obtained from one of the complainants (namely, Haker), the area in the vicinity where the incident occurred was cordaned off by police officers.

The incident occurred about 1:00 A.M. on July 13, 1967 and at approximately 2:00 A.M., Lieutenant Drescher encountered appellant, who, according to Drescher, matched the description broadcast in the lookout. Appellant was taken by other police officers to Providence Hospital, where Haker was being treated for head injuries. It was there that appellant was identified by both Haker and Clark as being the assailant. He was not placed in a lineup and he was not advised that he had the right to counsel during any confrontation. In fact, it was obvious from a reading of the record that at the time appellant was shown to complainants at the hospital he was the only suspect to be viewed.

The Court, during a voir dire, conducted out of the presence

of the jury, ruled the identification at the hospital inadmissible, but permitted in-court identification. The Court was satisfied that there was an independant origin for admitting the in-court identification, apart from the hospital confrontation. Appellant contends that the Trial Court erred in its ruling on the latter point.

Under the decisions of United States v. Wade, 388 U.S. 218; Gilbert v. California, 388 U.S. 263; and Stovall v. Denno, 388 U.S. 293, appellant contends that the Trial Court was correct in ruling inadmissible the hospital confrontation.

In the first place, appellant was shown singely to complainants and not in a lineup; secondly, counsel was not present nor was counsel afforded; thirdly, there was no emergency or urgency for not conducting a proper lineup with the aid of counsel. Complainant, Haker, was not seriously injured and there was no danger that he would be lost and that an immediate confrontation was imperative, as was the case in Stovall v. Denno, supra. Furthermore, none of the factors present in Wise v. United States, ___U.S. App. D.C.___, 383 F.2d 206, were present in this case. Complainants were at the hospital and not at the scene of the incident. Appellant was apprehended an hour after the incident and there was ample opportunity for a proper lineup to have been conducted at the precinct.

The present case is likewise distinguishable from Kennedy v. United States, 122 U.S. App. D.C. 291, 353 F.2d 462, where prisoner in that case was apprehended by two men fleeing from a house from which screams emanated, and was immediately taken

into the house to be identified.

Under either Wade, supra or Stovall, supra, the circumstances of the confrontation at the hospital were highly prejudicial and violated appellant's rights under the Sixth Amendment as well as offending due process requirements.

However, the Trial Court's determination that the in-court identification was of independant origin, is not supported by the record in appellant's view. The fact that both complainants testified that notwithstanding the hospital confrontation, they could identify appellant is not controlling nor convincing. United States v. Wilson, 283 F.Supp. 914, 916.

Wade, supra, stated that the Government must establish "by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification."

In the case of People v. Caruso, 65 Cal. Rptr. 336, 436 P.2d 336, the Supreme Court of California, reiterated that the phrase "clear and convincing evidence" means "clear, explicit, and unequivocal, so clear as to leave no substantial doubt, and sufficiently strong to command the unhesitating assent of every reasonable mind." The burden being upon the prosecution "of producing through the victims the requisite level of proof."

In the instant case, both victims first observed their assailant under conditions of stress. Haker was shot at, pulled through the window of his automobile, beaten, pursued and shot at again. His friend, Miss Clark, viewed the incident from the sidelines, fleeing to be later joined by Haker. Two police

officers testified as to Haker bleeding profusely from the head or face.

One hour later, both complainants were shown a lone suspect, appellant, outside the emergency room of the hospital. Though both stated that they could identify the suspect, their testimony differed from police that they both saw the suspect together outside the hospital. Appellant was seen later that day at the Court of General Sessions, where atleast Miss Clark was asked again if she could identify him. Haker testified at the preliminary hearing. Furthermore, Miss Clark testified as to seeing appellant some five times between the Monday preceding the trial and the trial itself. She discussed appellant with both Haker and the police officers.

In view of the totality of the circumstances outlined above and appearing in the record, appellant contends that the Government failed to establish by clear and convincing evidence how the in-court identifications had an independant origin from that of the hospital confrontation.

Appellant was viewed singely by complainants an hour after the incident. Single confrontations have been widely condemned. Stovall v. Denno, supra.; Wright v. United States, No. 20,153 decided January 31, 1968. Further, the hospital confrontation must certainly have been amplified by the confron tation at the preliminary hearing that same morning in the Court of General Sessions.

In view of all of the circumstances, in-court identification should not have been admitted in the absence of clear and convincing evidence of independant origin of identification.

The next point concerns in point of time when was appellant arrested. Initially, the police officers who received the report from Martin Haker observed his physical condition - bleeding profusely from face and head. A physical description of the assailant was obtained from the victim and flashed as a lookout. Lieutenant Drescher encountered appellant in the neighborhood an hour after the report and he testified that appellant matched the description as far as color, height, weight and clothing were concerned. Also, Drescher testified as to the equivocal nature of appellant's responses to his initial questions.

Appellant was "invited" to go to the hospital to be viewed. Lieutenant Drescher indicated that had it become necessary appellant would have been taken anyway if he had refused. (Tr. 65). Appellant contends that an arrest actually took place at the point where Drescher met appellant. Henry v. United States, 361 U.S. 98.

Based upon the observation of Haker's condition by the police officers, the description of the assailant obtained from him, the lookout that was broadcast on the basis of that information, Drescher's encounter with appellant an hour later in the vicinity of the attack and his evidence that appellant matched the description to gether with appellant initial responses to question, it is evident from prior decisions of this Court that probable cause existed for appellant's arrest. Daniels v. United States, No. 21,200, decided March 29, 1968; Bailey v. United States, ___U.S. App. D.C.___, 389 F.2d 305; Brown v. United States, 125 U.S. App. D.C. 43, 365 F.2d 976.

It would seem to appellant that where probable cause exists for making an arrest, the arrest should be made and officers should not beat around the bush with suspects. When arrests are made and interrogation is contemplated, suspects are entitled to the warnings set forth in Miranda v. Arizona, 384 U.S. 436. Likewise, appellant contends that as a corollary, if police intend to conduct an identification procedure, the suspect is entitled to be advised that he has the right to counsel at any such confrontation. The right to counsel was not given to appellant in this regard. Instead he was taken to the emergency door ofa hospital and subjected to a most widely condemned form of confrontation - a single show-up. He was at- that time "placed under arrest" and later that morning the victims again saw appellant at the preliminary hearing. All the advantages which might have been gained by a properly conducted lineup were forever lost.

Appellant submits that in view of all of the circumstances, the hospital confrontation and the procedures followed together with the lack of a warning of rights under Wade, supra. amounted to primary illegality and that all that flowed from it was the'fruit of that poisoneous tree! Wong Sun v. United States, 371 U.S. 471.

That the chain extending from hospital confrontation, to preliminary hearing, viewing of appellant at the Courthouse several days preceding the trial and discussions between complainants and police officers tainted the in-court identification and they therefore should have been excluded.

The Alibi Instruction

During the course of the Court's instruction regarding the defense of alibi, the Court stated:

> ". . .That is a perfectly legitimate defense. OF COURSE, YOU MUST ASK YOURSELF WHETHER IT IS ESTABLISHED. IF IT IS ESTABLISHED, THEN THE GOVERNMENT MUST, BEYOND A REASONABLE DOUBT, NEGATE IT IN ORDER TO MAKE ITS CASE. . ." (emphasis added). (Tr. 334).

No objection was made to this portion of the charge, but in view of the fact that the defense in this case was alibi, appellant contends that under the doctrine of "plain error" under Rule 52(b) of the Federal Rules of Criminal Procedure.

The import of the instruction was that there was a burden upon appellant to prove his defense of alibi. It has been held that there is no burden of proof on the part of a defendant to prove an alibi. Glover v. United States, 147 Fed. 426; Thomas v. United States, 213 F.2d 30; Johnson v. Bennett, 386 F.2d 677, 682.

The instruction completely militated against the doctrine of presumption of innocense and burden of proof in criminal cases. Even though the balance of the alibi instruction comported with Goodall v. United States, 180 F.2d 397, such instruction did not cure the error above. See Glover v. United States, supra.

Taking the instruction as a whole, appellant contends that it was self-contradictory and tended to confuse the jury on the sole and important issue of the defense in this case.

CONCLUSION

In view of the premises, heretofore considered, appellant contends that the judgment of the District Court be reversed with direction to grant a new trial.

Respectfully submitted,

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,034

DONVIL L. MCMORRIS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
ARTHUR L. BURNETT,
Assistant United States Attorneys.

ISSUES PRESENTED

In the opinion of appellee, the following issues are presented:

(1) Was the trial court's finding that there was clear and convincing evidence that the complaining witnesses' ability to identify appellant at the trial was based on their observations of him during the crime episode and was not due to their viewing of him at the hospital in a one-man confrontation approximately an hour later or any improper police suggestion "clearly erroneous"?

(2) Did the trial court's comments in its charge to the jury on alibi, that if it was established by the testimony the Government must negate it beyond a reasonable doubt, place upon appellant the burden of establishing alibi and thus constitute "plain error"?

This case has not previously been before this Court under any other name or title.

INDEX

TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,094

DONVIL L. McMORRIS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Following conviction by a jury on December 26, 1967 on four counts, two counts charging assault with intent to commit robbery and two counts charging assault with a dangerous weapon, the United States District Judge, the Honorable Oliver J. Gasch, on February 23, 1968 sentenced appellant to imprisonment for a period of two (2) to eight (8) years on each of the four counts, the sentences to run concurrently. A notice of appeal was filed on the same date.

After the trial had commenced and one of the two complaining witnesses during the course of his direct examina-

tion was about to reach the point in his testimony where he would be asked to identify his assailant, the trial judge intervened with respect to the need for a hearing out of the presence of the jury to ascertain the circumstances surrounding the witness' ability to make an in-court identification of appellant (Tr. 26) and after some colloquy with counsel on both sides (Tr. 26-47), the court concluded that it was required to hold a hearing to determine whether the in-court identification had an "independent origin".[1] It is significant to note that the learned trial judge observed during the course of the colloquy with counsel that the teaching of *Wade*, *Gilbert*, and *Stovall*[2] required the following:

> It means that in order to enable you [the Government] to go forward with your case, I must be satisfied from the evidence that this complaining witness had such a complete opportunity to see this defendant at the time of the struggle that he would be able today, based on that and that alone, to give us an adequate in-court identification of this defendant.
>
> If I can so hold after I heard the evidence, then I think you would be in a position to go forward. Otherwise, no. (Tr. 36.)

Earlier in his comments, the trial judge had noted that if it can be reasonably said that the witness' identification flows from a tainted lineup rather than his contact with the defendant on the occasion of the alleged crime, the court cannot permit him to identify the defendant in court (Tr. 32). The trial court concluded with the observation: "What I propose to do, therefore, is to ascertain as ac-

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[1] In his opening statement, Government counsel had alluded to the defendant going to Providence Hospital where the complaining witnesses had viewed him and that the defendant was then arrested (Tr. 12). During the colloquy Government counsel had also proffered that at the time the defendant was brought to the hospital for viewing he was not under arrest and that he freely volunteered when asked to go to the hospital (Tr. 41-42).

[2] *United States* v. *Wade*, 388 U.S. 218 (1967); *Gilbert* v. *California*, 388 U.S. 263 (1967); and *Stovall* v. *Denno*, 388 U.S. 293 (1967).

curately as I can, the circumstances surrounding the ability of this complaining witness to make an identification in court at this time as well as whether or not there was any suggestion by the police with reference to the identification at the hospital" (Tr. 46).

It was against this background that the hearing was conducted and the trial court thereafter made its determination that the in-court identification had an "independent origin" and was based on the ability of the two complaining witnesses to identify this defendant based on their opportunity to observe and their actual observation of the defendant during the course of the criminal attack and the absence of any affirmative suggestion or influence by the police at the hospital when the defendant was viewed by the two complainants.

Martin J. Haker, one of the two complaining witnesses, testified that he was in his car with Miss Susan Clark, the other complaining witness, when she screamed and he turned around and saw appellant. He was sitting in the middle of the front seat with his back to the door on the driver's side. They were parked on the Franciscan Monastery parking lot at 14th and Quincy Streets, Northeast at approximately 1:00 a.m. on July 13, 1967. On direct examination Mr. Haker testified that there was a light post approximately 10 or 15 feet from the car on the left side of it and it was illuminating the area inside and outside the car. When he turned the defendant's face was approximately a foot from his face (Tr. 83). He then grabbed the gun held by his assailant, and it went off with the bullet hitting the back seat. He was then pulled through the window on the driver's side in his struggle with his assailant and landed on the ground outside of the car. He rolled over and looked up at his assailant whose face was about a foot above him and he could see his face clearly (Tr. 84-85). Then they struggle toward the back of the car and were there for ten or fifteen seconds, but the light did not illuminate this particular area. Mr. Haker testified that he then ran out of the parking lot and down the street and his assailant followed him for ap-

proximately a half a block or a couple of hundred yards, and during this chase he was looking back at him (Tr. 86). His object was to get his assailant away from the car so that Miss Clark would not be harmed and thus he was looking over his shoulder. During the chase, his assailant was within ten or fifteen yards behind him. There were lamp posts on the street and the light from the two lamp posts was shining on the area in which the two of them were running. This chase lasted for another 15 or 20 seconds (Tr. 87). Mr. Haker saw the defendant stop in his chase some 20 to 25 yards behind him, and then go back towards the car. Mr. Haker then went up on top of a nearby hill and saw his assailant come up behind the car and go through a window into the car (Tr. 87b).[3] At that point, he circled back towards the car and was approximately some 15 yards away. Mr. Haker then saw his attacker come back out of the window and start to walk away. At that point, he was walking more or less in front of Mr. Haker, but away. His assailant walked for about 10 or 15 yards, stopped, turned around, put the gun up, and shot twice in the direction he was standing. Mr. Haker was watching him during all this time. At the time the defendant fired the gun he was just a couple of yards beyond the lamp post and the light was shining down on him. After the person fired the shots Mr. Haker feigned being hit, fell to the ground, and his attacker ran (Tr. 88-89). Mr. Haker estimated that the whole sequence of events as outlined above took three to five minutes (Tr. 90).

Mr. Haker further testified that he saw his attacker again that night a little later at the Providence Hospital right outside the emergency room. Some police officer told him: "We have a suspect outside. I want you to go outside and look at him, but don't say a word to him." (Tr. 90-91). Mr. Haker testified that he looked at the person three or four seconds. There were some police officers

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[3] There are two pages numbered "87" as the transcript of the trial is paginated. In using the designation "87b" appellee is referring to the second page 87.

standing there approximately a foot to each side of this person, but the person was not handcuffed. Mr. Haker testified that Miss Clark was not with him at the time he viewed his assailant (Tr. 92). Finally, Mr. Haker testified that if he excluded from his mental processes what happened at the hospital with reference to viewing his attacker, he would be able to identify the man in court, the appellant, as the man who had attacked him that night and that he had no doubt about it (Tr. 93).

On cross examination, Mr. Haker testified that he gave the police a description of his assailant, stating that the person who attacked him was approximately his size but a little heavier and was wearing a light blue shirt and dark pants (Tr. 96). He further stated that he was 5′11″ or 6′ and weighed approximately 160-165 pounds. With reference to the lighting he indicated that the light in the parking lot where these events began was a fluorescent light (Tr. 99). On redirect examination Mr. Haker further testified that at the hospital he had noticed a mark on the defendant's nose, his forehead, and his eyebrow and that during the altercation he, Mr. Haker, had struck his assailant with his left hand across the face in the vicinity of the nose (Tr. 104-105). Mr. Haker testified that he had no conversation with Miss Clark at the hospital concerning the identification (Tr. 105-106).[4]

Miss Susan Clark, the other complaining witness, at the hearing testified on direct examination that she was with Mr. Martin J. Haker on July 13, 1967 at about 1:00 a.m. in the morning in a car in the parking lot at the Franciscan Monastery, when she looked up and saw a man creeping up to the window on the driver's side. She was startled and did not say anything at first, but merely sort of

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[4] Insofar as relevant to the issue here of Mr. Haker's opportunity to observe his assailant, his actual observation during the course of the assault, and the absence of affirmative suggestion or influence by the police, it appears that his testimony to the extent elicited in the presence of the jury prior to the hearing and his subsequent testimony after the hearing is entirely consistent with the testimony given at the hearing out of the presence of the jury as set out above (Tr. 13-26, 152-179).

watched him come up. She testified, "I guess it was a couple seconds, enough to look at him before I screamed" (Tr. 109). She testified that they were near one of the lights and "You could see clear" (Tr. 110). After she screamed, and the man said "Give me your money", Mr. Haker turned around and grabbed the gun which went off in the back of the car and then Mr. Haker started struggling with the assailant and was pulled out of the window and they started fighting outside the car. She watched the fighting right outside the driver's window and she was only five feet away. When asked whether during the fight she had an opportunity to look at the assailant, she replied, "Yes, I watched them" (Tr. 110). The struggle continued around to the back of the car and when Mr. Haker and his assailant ran up the street, she got out of the car and ran around the back of some houses. After she got out of the car she did not see the attacker after that (Tr. 111). She further testified that the attacker was wearing a light blue sport shirt and dark blue trousers and that he was approximately 5'11" and weighed about 165 or 170 pounds (Tr. 112). She also testified that as Mr. Haker and the assailant ran up the street, she believed there were street lights and they ran near by them and she could see the assailant clearly (Tr. 113).

Miss Clark testified that later that night she saw the attacker again at the hospital and that a policeman had said to her that they had found a man outside and wanted her to come out and see if she could recognize him (Tr. 113). She was not with Mr. Haker when she went outside with the policeman. She thought she went out first to view the man and that Mr. Haker was still in the emergency room. She saw the same man who had been over at the parking lot earlier that night. She testified that when she got outside the police officer just said "Is this the man you saw", and she said "yes" (Tr. 114-115). She identified appellant in the courtroom as the man who was the assailant and as the man she saw at the hospital and further testified that she could identify him in court excluding from her recollection anything that happened at

the hospital (Tr. 116). Miss Clark in response to a question by the court indicated that after she made her identification and prior to the time Mr. Haker came out she did not have any communication with Mr. Haker (Tr. 116).[5]

Officer Roy G. Lamb testified that around 1:10 or 1:15 a.m. on July 13, 1967 he observed a car coming south on 12th Street, N.E., in the vicinity of 12th and Otis Street, N.E., at a high rate of speed with no lights. The car pulled over to the curb. Mr. Haker got out of the car. He was bleeding quite badly about the head and face. Mr. Haker ran over and said that he had just been attacked at the parking lot at 14th and Quincy Streets, Northeast. Officer Lamb testified that Mr. Haker furnished a description of his assailant, to wit, "It was of a Negro male, about 18 years old, 170 pounds, medium dark skin. He was wearing a light blue shirt, dark pants and the shirt was worn on the outside" (Tr. 135).

Officer Lamb further testified that later that night he was at Providence Hospital in the back seat of Mr. Haker's car to check for a bullet hole and a bullet, when appellant was brought to the hospital by Detective Thomas (Tr. 138). Officer Lamb further testified that he believed that Detective Thomas went into the hospital and got the complainants and further that he believed that Detective Thomas and the two complainants came out together (Tr. 139). They appeared to have had a brief conversation which he did not overhear since he was inside Mr. Haker's car some 20 to 25 feet away. The officers then put Mr.

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[5] On cross examination, Miss Clark indicated that when she saw the man at the hospital she recalled the shirt as being a light blue sport shirt with short sleeves and that it was hanging out and further that she thought it had little crosses on it, although she could not be sure (Tr. 119-120). She further denied that she had told the police officer when she first saw the man at the hospital that "I am not sure" and asserted, "No I said I was positive of this man" (Tr. 121). Her testimony later in presence of the jury insofar as it covered the same ground as outlined above was substantially consistent with the testimony given at the hearing (Tr. 180-198).

McMorris back into the scout car and the complainants went back inside the hospital (Tr. 140).[6]

Officer Billy G. Thomas testified that approximately around 2:00 a.m. he met Lieutenant Drescher who had appellant with him and that the appellant got in the back seat of the cruiser. He and his partner, Officer Murphy, transported appellant to Providence Hospital. Officer Thomas testified that upon arrival at the hospital, he went in after the two complainants who were in the emergency room. He further testified that they came outside the front door of the emergency room. When asked which one he brought out first, he answered, "I believe Mr. Haker. I couldn't recall" (Tr. 125). When he went in to get Mr. Haker, he just motioned for him with his hand to come outside and said he had someone that he would like for him to look at (Tr. 126). Officer Thomas testified that Mr. Haker just looked at the defendant outside and when he went back into the emergency room he said, "that is the subject that assaulted me" (Tr. 126-127). When asked about Miss Clark's identification, Officer Thomas testified that she came out about the same time that Mr. Haker did but that he could not recall if another officer went in, whether he did, or if she just came out (Tr. 127). Officer Thomas by his answers indicated that he did not recall the circumstances of Miss Clark's identification (Tr. 127).

Officer Charles L. Murphy, Officer Thomas' partner that night, testified that around 2:00 a.m. they met Lieutenant Drescher who had a person fitting the description of the person they were trying to apprehend. The Lieutenant asked them to take this person to Providence Hospital. The trip to the hospital took a couple of minutes. Officer

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[6] It is significant to note that Officer Lamb merely stated that he *believed* that both complainants came out of the hospital together to view the defendant. While this was perhaps an honest belief, it could be error, since it would appear that the victims of a crime would have a more vivid and accurate recollection of what occurred than a police officer who deals with numerous crime situations daily and who, perhaps, in the interval has been present at other situations in which the victims and the alleged assailant confronted each other. (Emphasis added.)

Murphy testified that as they got out of the car, the person who was assaulted and the girl who was with him, were coming out of the hospital (Tr. 71). Detective Thomas asked if they could identify the defendant. When asked, "Did he ask both of them or just one of them?" Officer Murphy replied, "I think he was talking only to the male subject" (Tr. 71). Officer Murphy further testified that if he remembered correctly, Mr. Haker nodded his head "yes" and that Miss Clark also said "yes" (Tr. 72). They then placed the defendant under arrest and advised him of his rights (Tr. 73).[7] The defendant was taken to Number 12 Precinct. When asked if the complainants saw the defendant again that night, Officer Murphy testified that they saw him at the station, and then he qualified that by saying he was pretty sure they did, because the police got statements from the two complainants (Tr. 74).[8]

After hearing the testimony of the witnesses as outlined above, the trial judge concluded: "As I read *Wade*, this hearing has established that the in-court identification had an independent origin so far as the opportunity of obser-

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[7] Lieutenant Earl L. Drescher also testified at the hearing out of the presence of the jury. He testified that he had heard a lookout broadcast giving a description of the assailant as a Negro male, 18 years old, about 5'11", 170 pounds, or so, wearing a light blue shirt with the shirttail out of the trousers and dark trousers (Tr. 56). Shortly after 2:00 a.m. he stopped the defendant who matched the description at 13th and Quincy Street, Northeast. He told the defendant that a serious crime had been committed in the area and that he didn't have to answer any questions if he did not want to do so. Lieutenant Drescher testified that he told the defendant he did fit the description and that if he would take a couple of minutes of his time, they could settle it, as the complainants were just a few blocks away at the hospital. Lieutenant Drescher testified that the defendant said he would be glad to go along. He called for a cruiser, and the defendant got in the back seat of the car and was transported to the hospital (Tr. 58-59). Lieutenant Drescher testified that when he confronted the defendant on the street, he did not consider that he had placed him under arrest and he did search him or frisk him for weapons (Tr. 61-62, 65-66).

[8] Both Mr. Haker and Miss Clark testified that they did not go to the Precinct that night and Officer Lamb indicated that he got the information for his report from Mr. Haker at the hospital (Tr. 94-95, 122, 137-142).

vation at the time the incident is alleged to have transpired which forms the basis of this charge" (Tr. 147) and "As I read the decisions that I think are applicable, I think that the Government should be permitted to establish by clear and convincing evidence that the in-court identification was based on observations of the suspect other than at the lineup. The Court is satisfied that the Government has such evidence . . ." (Tr. 148).

Thereafter, the trial resumed and the Government presented its case. The appellant presented an alibi defense. He testified that at about the time of the alleged crime here he was at the Chez Maurice nightclub located at Ninth and U Streets, Northwest and that he left there about 1:20 a.m. with two friends, Tom Fulton and Henry Galbreath. They then went to his car and he dropped his two friends off at Rhode Island Avenue and First Street, Northwest and proceeded to his home. He turned on 12th Street, Northeast and proceeded to Quincy Street onto which he turned right. Between 13th and 14th Streets on Quincy his car cut off. He parked in the middle of the block and went home to get a screwdriver to work on his car. He got home at 1324 Taylor Street, Northeast at about 1:35 a.m. After a short stay at home he got a screwdriver and was on his way back to his car when he was arrested by Lieutenant Drescher. (Tr. 243-251).

Henry Galbreath testified that he had been with appellant the night of the crime and that they had left a movie together he guessed around 11:30 or a quarter to 12:00, somewhere around that time (Tr. 272). He thought they went directly to a discoteque called Chez Maurice (Tr. 272-273).[9] When asked what time he left the Chez Maurice, he replied: "We left there around 1:30, I guess. It was early that morning when we left, 1:30, quarter after 1:00, somewhere around there (Tr. 274). Mr. Galbreath testified that appellant took him home and let him out of

[9] Appellant had testified that after leaving the theater they drove past the Chez Maurice and went to the Miles Long sandwich shop located on Seventh and Florida Avenues, Northwest and that they had remained there for about one-half hour (Tr. 246-247).

the car at 1520 Gales Street, Northeast. When asked whether he knew what time he got home, the witness responded: "I guess late at night. It didn't take that long to get home, a five-minute drive, I guess. I really can't pinpoint all these times as far as when I got home because when you are out late at night, you really don't have too much sense of the time" (Tr. 275).[10]

Thomas Fulton, Jr. also testified on behalf of appellant. He stated that after they left the movie, they went to the Chez Maurice. When asked what time he got there, he replied: "It must have been around 12:30, 12:15 or 12:30. I can't pinpoint the time because, you know, I can tell you reasonably about what time it was. I would say it was between 12:10 and 12:30" (Tr. 284). He testified that they left there sometime between 25 after 1:00 and quarter of (Tr. 284). On cross examination when asked if they went anywhere else between the time they left the movie and went to the Chez Maurice, he replied: "I am pretty sure we didn't stop anywhere. No, we didn't stop anywhere" (Tr. 289). He further testified that he got out of appellant's car at First and Rhode Island he would guess anywhere between 25 minutes of 2:00 and quarter of but he did not remember if he got out alone or not (Tr. 295-296).

It was against the background of the above-described testimony that the trial court instructed:

> Now, ladies and gentlemen, the defense in this case, as the Court has indicated to you, is two-fold. There is the defense of alibi, which means, 'I wasn't there. I was someplace else.' That is a perfectly legitimate defense. Of course, you must ask yourselves whether it is established. If it is established, then the Government must, beyond a reasonable doubt, negate it in order to make its case. (Tr. 334.)

The trial court then proceeded to give the standard alibi instruction to which appellant's counsel on appeal does not

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[10] Compare the witness' responses on cross examination as to his inability to remember, his vagueness, and his lack of certainty about the events of the night of July 12-13, 1967 (Tr. 276-281).

object (Tr. 334-335). At the conclusion of the charge to the jury, trial counsel for appellant and Government counsel both indicated satisfaction with the charge (Tr. 336).

ARGUMENT

I. The trial court's finding of fact after conducting a hearing that there was clear and convincing evidence that the complaining witnesses' in-court identification had an independent origin sufficient to dissipate any taint from the hospital one man confrontation is adequately supported by the record and not clearly erroneous.

(Tr. 26-47, 61-66, 71-74, 83-96, 99, 105-06, 109-15, 119-21, 125-27, 135-42, 147-48)

The trial court's finding of fact after conducting a hearing out of the presence of the jury that it was satisfied that there was clear and convincing evidence that the complaining witnesses could identify appellant in court based on their opportunity to observe and their actual observations during the three to five minutes the sequence of events took which constituted the alleged criminal offenses is abundantly supported by the detailed evidence given by the two witnesses at the hearing and supported by the testimony of the police officers, although there are some minor discrepancies which can be accounted for by the fact that the victims would have a more accurate and vivid recollection of the events than the police officers who deal with many criminal offenses daily.[11] That the trial court was

[11] The trial court concluded from the proffer made by counsel and the colloquy prior to the hearing that the taking of appellant to the hospital and permitting him to be viewed by the complaining witnesses without counsel present violated *Wade* and *Gilbert*. (Tr. 26-48). Government counsel did raise an interesting question in representing to the Court that appellant when he went to the hospital voluntarily accompanied the officers and was not then under arrest and for that reason *Wade* and *Gilbert* should not apply. The trial court stated: "We are not really concerned about that circumstance, . . ., as far as I know, that is not the evidence in this case. If it were, I might be confronted with something that is much less difficult." (Tr. 42). It appears that after the hearing the trial court

completely comprehending of the standard it was to apply cannot be doubted, for the trial court in its colloquy before the hearing commenced expressly referred to *United States* v. *Wade*, *supra*, reading the language therefrom to the effect that a trial court is required to make a determination whether the in-court identification has an independent origin (Tr. 46-47).[12]

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did not again treat this issue, but made its decision based on evaluation of whether the in-court identification had an independent source or not. Implicit in predicating its determination on this ground is a finding that though the police officers testified that appellant was not placed under arrest when confronted by Lieutenant Drescher or when transported to the hospital, he was in legal contemplation then under arrest, or, in the alternative, in any event, whether or not appellant was under arrest was immaterial for the dangers of a one man confrontation is the same in any event.

On the other hand, it may be urged that police officers need not effectuate an arrest at the very first moment probable cause occurs, but may continue their investigation. *Hoffa* v. *United States*, 385 U.S. 293, 310 (1966). An officer confronted with a man against whom he has probable cause, may nevertheless still have doubts as to whether the man is the right person or not. If the man insists that he is not the man and desires to confront the complainant believing that the complainant will be unable to identify him, but his stratagem fails, should *Wade* and *Gilbert* still apply and the Government be required to show that the identification had an independent origin. If in such a situation the complainant failed to identify the man, the police could thank him for his cooperation and permit him to go on his way and he would avoid the stigma of being arrested, booked, and the requirements of perhaps posting bond to regain his liberty. It would appear that a lineup with counsel present in accord with the dictates of *Wade* and *Gilbert* would require a formal arrest along with the concomitant disadvantages and stigma, which might be avoided by a conscientious and dedicated officer who wants to be certain he has the right man before he puts the arrest machinery into operation. Compare *Commonwealth* v. *Paul Bumpus*, 3 Cr. L. Rptr. 3207 (Mass. Sup. Judicial Ct., June 14, 1968).

Perhaps with the enactment of Section 701 of the Omnibus Crime Control and Safe Street Act of 1968, adding to Title 18, U.S. Code a new section designated as Section 3502, see fn. 12 *infra*, this Court will never have to resolve this issue.

[12] The standard laid down by the Supreme Court in *Wade* and *Gilbert*, *supra*, has not been without its critics. Mr. Justice Black in dissenting in part and concurring in part in *Wade*, stated: "I think the rule fashioned by the Court in unsound. The "tainted fruit" determination required by the Court involves more than

In *Wade, supra,* Mr. Justice Brennan pointed out that the application of the test there laid down required consideration of various factors. 388 U.S. at 241. Specifically, enumerated was the prior opportunity to observe the alleged criminal act. Here, both complaining witnesses testified in detail concerning the lighting conditions, the se-

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considerable difficulty. I think it is practically impossible. How is a witness capable of probing the recesses of his mind to draw a sharp line between a courtroom identification due exclusively to an earlier lineup and a courtroom identification due to memory not based on the lineup? What kind of "clear and convincing evidence" can the prosecution offer to prove upon what particular events memories resulting in an in-court identification rest? How long will trials be delayed while judges turn psychologists to probe the subconscious minds of witnesses? All these questions are posed but not answered by the Court's opinion." 388 U.S. at 248.

Earlier in *Gilbert* v. *United States,* 366 F.2d 923 (9th Cir. 1966), *cert. denied,* 388 U.S. 922 (1967), Circuit Judges Duniway and Barnes observed that it was urged that, if the courtroom identification rests wholly or substantially upon the unlawful lineup identification, it should be excluded as fruit of the poisonous tree, and the court should have held a hearing to determine whether that is so. In commenting on this proposition they stated: "If there is any way in which the degree to which that is so can be measured and decided at the hearing suggested, we do not know what it is. The human mind is not a series of separate compartments of knowledge. Pretending that it is may enable a court to think that it is effectively carrying out a constitutional duty. But we can hardly conceive of a more futile or unrealistic exercise in judicial fact finding." 366 F.2d at 944-45.

It appears that a majority of Congress was mindful of such considerations when it enacted "The Omnibus Crime Control and Safe Street Act of 1968", adding Section 3502 to Title 18, U.S. Code, which provides: "*Admissibility of evidence of eyewitness testimony.* The testimony of a witness that he saw the accused commit or participate in the commission of the crime for which the accused is being tried shall be admissible in evidence in a criminal prosecution in any trial court ordained and established under article III of the Constitution of the United States." Act of June 19, 1968, P.L. 90-351, 82 Stat. 197, 211, 18 U.S.C. § 3502.

Appellee is of the opinion that the possible application of this statute to a case on appeal need not be considered here, for on this record the trial court's action can be sustained on the ground that there was more than sufficient factual information before the court to support its finding of fact, and most certainly, his determination cannot be said to be clearly erroneous. See Government's Supplemental Memorandum on Rehearing En Banc in *Malcus T. Clemons* v. *United States,* No. 19,846, pp. 31-32.

quence of events, and their actual observations of the defendant's face, build and clothing. Another factor emphasized by Mr. Justice Brennan was the existence *vel non* of any discrepancy between any pre-lineup description and the defendant's actual description. Here the complaining witnesses testified to the detailed description they gave of their assailant which was the basis of the lookout broadcasted about which the police officers also testified. The defendant was before the Court and certainly the trial judge compared his physical characteristics with the description initially given to the police officers. The officers also testified to the type of clothing he was wearing when he was first confronted and then taken to the hospital where he was viewed by the complaining witnesses. Another factor emphasized in *Wade* was the lapse of time between the alleged act and the lineup identification. In this case, it appears that at most there was only an hour interval between the alleged attack and the time the complaining witnesses saw appellant at the hospital. This Court has also indicated that the time between the crime and the identification is an obvious relevant consideration affecting suggestibility and misidentification. *Wise* v. *United States*, 127 U.S. App. D.C. 279, 281, 383 F.2d 206, 208 (1967). The closer the viewing is to the time of the actual crime the more likely the victim or eyewitness is apt to have a vivid mental picture of the assailant and the more accurate his identification should be.[13] Other relevant considerations which the trial judge could have considered here was that at the hospital both complaining witnesses viewed the appellant separately, they immediately recognized him, the degree of their firmness and positivity in identification, and the absence of any statements by the police except that they had a suspect outside which

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[13] Indeed, a panel of this Court stated, "Obtaining such nearby identification while the memory of the witness is fresh is plainly 'effective and intelligent law enforcement.'" 127 U.S. App. D.C. at 281, 383 F.2d at 208. See also *Willie J. Walker* v. *United States*, D.C. Cir. No. 20,309, unreported opinion filed June 17, 1968; and *Willie M. Daniels, Jr.* v. *United States*, —— U.S .App. D.C. ——, 393 F.2d 359, 361 (1968).

they wanted them to look at to see if they could identify him or not. Finally, the trial court here could have concluded that in many instances because of a victim's intense involvement in the incident, he will have a vivid recollection of the face of the person perpetrating the crime upon him.

In *Stovall* v. *Denno*, 388 U.S. 293, 302 (1967), the Supreme Court while indicating that some writers had widely condemned the practice of showing suspects singly to persons for identification, and not as part of a lineup, stated that a claimed violation of due process of law in the conduct of such a confrontation depended upon the totality of circumstances surrounding it. It is submitted that whether a complainant or eyewitness can make an in-court identification independent of his observations of the accused during a one man confrontation should likewise depend upon the totality of the circumstances. Cf. *James W. Kelly and Joseph Isaac* v. *United States*, D.C. Cir Nos. 20533 and 20544, unreported opinion filed March 11, 1968, pp. 2-3. As in *Kelly*, *supra*, it may here be said that the trial judge carefully conducted a hearing which reflected his awareness of the issue presented and the standard to be applied, and that he properly determined that the witnesses were not acting on any improper police suggestion, but were using their own memories, their own intelligence and their own volition. Under these circumstances it is submitted that it would indeed be difficult for this Court to say that the trial court's finding was "clearly erroneous", especially in view of the fact that an appellate court should only reverse a trial court, who saw the witnesses and evaluated their demeanor and manner on the witness stand, most reluctantly and only when well persuaded. *Henry W. Jackson* v. *United States*, 122 U.S. App. D.C. 326-327, nn. 4 & 5, 353 F.2d 862, 864-865 nn. 4, 5 (1965).[14]

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[14] In this connection, the Court's attention is invited to those cases involving a one man confrontation, in which the courts since the *Stovall* v. *Denno* decision have concluded that there was no due process violation since the totality of the circumstances did not

II. The trial court's preliminary comment in connection with alibi that if the jury found "it is established" which preceded the giving of the standard alibi instruction did not constitute error, much less plain error.

(Tr. 243-51, 272-81, 284, 289, 295-96, 317-336)

Throughout the entire charge the trial court emphasized the presumption of innocence, that the burden of proof was on the Government, and that the Government had to prove appellant's guilt beyond a reasonable doubt (Tr. 317-336). Appellant's counsel on appeal attempts to take two sentences quoted below [15] out of context and con-

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show that the in-court identification was the product of a "unnecessarily suggestive" (language used in *Stovall* v. *Denno*, 388 U.S. at 302) or "impermissibly suggestive" (language used in *Simmons* v. *United States*, 390 U.S. 377 (1968) and *cf. Calvin F. Smith* v. *United States*, D.C. Cir. No. 20,773 decided June 7, 1968, slip opinion, pp. 3-6, (dissenting opinion of Senior Circuit Judge Prettyman)) lineup or showup which would give rise to a very substantial likelihood of irreparable mistaken identification. See Mr. Justice Douglas' explicit statement that due process is not always violated when the police fail to assemble a lineup but instead conduct a one-man showup, *Biggers* v. *Tennessee*, 390 U.S. 404, 408 (1968) (dissenting opinion). It is submitted that these cases are relevant to show that courts in these cases have been convinced that there was sufficient independent sources or bases for the witnesses' in-court identification to support the convictions notwithstanding the contention of a due process violation. See, *e.g.*, *James Hemphill* v. *United States*, D.C. Cir. No. 21,432, decided June 12, 1968, slip opinion, pp. 8-9; *Hanks* v. *United States*, 388 F.2d 171, 173-74 (10th Cir. 1968); *United States* v. *O'Connor*, 282 F.Supp. 963 (D.D.C. 1968) (Gasch, J.); *Commonwealth* v. *Bumpers*, 3 Cr. L. Rptr. 3207 (Mass. Sup. Judicial Ct., June 14, 1968) (this case involved events occurring on July 13, 1967 and the application of *Wade*, *Gilbert*, and *Stovall* to a one man confrontation—a factual and legal situation strikingly similar to that on appeal here); *State* v. *Keeney*, 425 S.W.2d 85 (Mo. 1968); *Fogg* v. *Commonwealth*, 208 Va. 541, 159 S.E.2d 616 (1968) (one man confrontation in the form of first seeing the accused at a preliminary hearing after declining to make an identification from photographs in a rape case); *Marden* v. *State*, 203 So.2d 638 (Dist. Ct. of Appeal, Fla. 1967).

[15] "Of course, you must ask yourselves whether it is established. If it is established, then the Government must, beyond a reasonable doubt, negate it in order to make its case." (Tr. 334).

vince this Court that they shifted the burden of proof and communicated to the jury that appellant had the burden of establishing his alibi defense. Appellee submits that the comments should be viewed in the context of this trial against the background of the testimony of the alibi witnesses who were uncertain and vague in their testimony as to significant times in relationship to the time of the alleged crime. Thus viewed, the questioned comments could logically be interpreted by the jury as telling them that they were the judges of the facts and it was the duty of the jury to decide the credibility of these alibi witnesses and whether their testimony established that at the critical time the crime occurred appellant was not at the scene of the crime and did not commit it because he was with his two companions elsewhere at that time. It is submitted that able and experienced trial counsel for appellant must have so interpreted the comments, for he did not object and further he indicated at the end of the trial court's instructions that he was satisfied. To further emphasize the point that this language did not place any burden on appellant to prove anything, the trial court, in effect, instructed the jury that if it finds that there is evidence tending to establish alibi, then the Government had the burden of negating it beyond a reasonable doubt.

Glover v. *United States*, 147 Fed. 426 (8th Cir. 1906), relied upon by appellant, is inapposite for there the trial court told the jury that as a matter of law the defendant had the burden of proof in establishing that he was at another place at the time of the commission of the crime, and that he must establish this by a preponderance of the evidence, that is, by the greater and superior evidence. 147 Fed. at 430. After the charge and appellant in *Glover* excepted, the court there repeated the charge and added that if the jury had any reasonable doubt as to whether the defendant was at some other place when the crime was committed, they should give the defendant the benefit of the doubt. It was in this context that the Eighth Circuit Court of Appeals stated that the two propositions were legally incongruous, and were well calculated to confuse

the understanding of the jury as to how they should apply the rule of reasonable doubt, and thus error was committed. That is not the case here. Likewise, in *Thomas* v. *United States*, 213 F.2d 30 (9th Cir. 1954) the trial court had instructed expressly that the burden was upon the defendant to make out his defense as to an alibi, and this was held to be error. *Johnson* v. *Bennett*, 386 F.2d 677, 682 (8th Cir. 1967), a habeas corpus proceeding attacking the validity of a state court conviction, also is not in point for the state court there involved had given an instruction that the defendant had the burden of proof of establishing his alibi defense by a preponderance of the evidence.

In this case, it cannot be fairly asserted that the trial court stated that appellant had the burden of establishing his alibi defense. However, if there is the slightest implication in that direction, this Court may consider it advisable to indicate that such language should be avoided in the future in giving an alibi instruction, but certainly in the context of this trial, the comments here questioned do not rise to the magnitude of plain error justifying a reversal of appellant's conviction.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,094

DONVIL L. McMORRIS, Appellant

v.

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court
for the District of Columbia

PETITION FOR REHEARING

Comes now the appellant, Donvil L. McMorris, by and through his attorney, and moves the Honorable Court for a rehearing in the above-entitled cause, and as reasons therefore states:

1. The case involved an incident at a parking lot wherein complainants encountered a man with a gun who appeared at the window of the complainant's automobile and demanded money. A struggle ensued, shots were fired and the man escaped. He was described to police officers and some hour later, appellant was accosted by a police lieutenant and requested to come to a hospital where complainants were being treated. It was there that appellant was identified by the complainants as being the assailant. He was viewed singly and later at a preliminary hearing that day.

2. This Court in its decision of November 26, 1968 was satisfied that the trial Court had ample support for

the conclusion that even though the hospital confrontation should be excluded, clear and convincing evidence had established an independant source for the in-court identification.

3. What the trial Court failed to consider and what does not appear in the decision of this Court is the effect of the viewing of appellant at a preliminary hearing the day of his arrest and the viewing of appellant in the Courthouse for several days prior to the trial, by the witness Susan Clarke. The question then becomes, does an improper confrontation become compounded by a viewing of the suspect at a preliminary hearing and later prior to the actual trial of the case.

4. Since Wade v. United States, 388 U.S. 218, Gilbert v. United States, 388 U.S. 263, and Stovall v. Denno, 388 U.S. 293, line-up issues have been decided on a case by case basis and that after a year and a half, certain defined principles have evolved concerning the test to be applied toward proving by clear and convincing evidence that the in-court identification had an independant origin. A recent decision of the U.S. District Court for the Southern District of New York, Geralds v. Deegan, decided November 12, 1968, 4 Cr. Law Reptr, 2081 is an example.

5. The recent opinion of this Court, Clemons, et al. v. United States, decided December 6, 1968, dealt in some measure with confrontation at a preliminary hearing, but did not reach the issue in this case.

6. It is respectfully submitted that the clear and convincing test as applied by the trial Court did not fully equate the preliminary confrontation and the viewing of appellant several days prior to the trial of this case with the single confrontation at the hospital and whether or not the combination of those three factors formed a continuing chain which tainted the in-court identification.

7. Appellant submits that these aspects should be fully explored and that definitive rulings are needed in situations where a concededly improper viewing of a suspect is followed in a matter of hours by a confrontation at a preliminary hearing. In effect the "die is cast."

For the reasons that appellant feels that greater clarification is needed in the area set forth above and because the facts presented such an issue, appellant requests that this petition for rehearing be granted.

Respectfully submitted,

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